

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 595 of 1992

with

CRIMINAL APPEAL No 783 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and  
MR.JUSTICE H.L.GOKHALE

=====

1. Whether Reporters of Local Papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not ?
3. Whether their Lordships wish to see the fair copy of judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

=====

-----  
PARESH LAGHURAM PRAJAPATI

Versus

STATE OF GUJARAT

-----  
Appearance:

1. Criminal Appeal No. 595 of 1992  
MR KG SHETH for Petitioners  
PUBLIC PROSECUTOR for Respondent No. 1
2. Criminal AppealNo 783 of 1992  
MR KG SHETH for Petitioners  
PUBLIC PROSECUTOR for Respondent No. 1

-----

CORAM : MR.JUSTICE N.J.PANDYA and  
MR.JUSTICE H.L.GOKHALE  
Date of decision: 06/02/97

ORAL JUDGEMENT

(Per Pandya, J.)

Though there appeared to be two appeals, in fact there is only one appeal because the earlier of the two was filed by the appellant in jail and subsequently for them privately second appeal came to be filed. The appeals arise out of the judgment rendered by the learned Additional Sessions Judge, Ahmedabad City, in Sessions Case No.6 of 1992 for charge under section 15 of the NDPS Act and section 66(b) of the Bombay Prohibition Act. Holding the accused guilty, the learned trial Judge awarded to each of them 10 years of RI and a fine of Rs.1,00,000 and in default simple imprisonment for one year. For offence under section 66(b) of the Bombay Prohibition Act also they were convicted.

2 The case against the appellants is that on 24.9.1991 they had brought 90 kg of powder of poppy capsule (posh na doda) in Bhopal Express. When the complainant-Head Constable found the accused under suspicious circumstances with three huge bundles they were intercepted and questioned by calling panch PW No.5 Parvatsinh. The articles were seized and from the initial examination the complainant and panch felt it to be powder of poppy capsule. The trial ensued resulted into conviction as stated above.

3 The learned counsel Mr Anandjiwala has raised a technical point as to whether the provisions of NDPS Act are at all attracted. This obviously goes to the root of the matter. He drew our attention to clauses 2(xvii) and 2(xviii) of the NDPS Act. The first of the two defines opium poppy. The definition, it seems, is confined to *Papaver Somniferum* L as also the plant of another species of *Papaver* from which opium or any phenanthrene alkaloid can be extracted.

4 The forensic laboratory report exh.29 containing physical as well as botanical report does indicate that the samples examined do contain opium poppy capsule. However, to qualify it to be a prohibited article under the NDPS Act, the prosecution is required to establish that the plant is of the said specie of *Papaver*

Somniferum L. or of any other Papaver specie capable of giving any of the alkaloids mentioned. In absence of this, according to Shri Anandjiwala, the case under section 15 of the NDPS Act cannot be said to have been made out by the prosecution.

5 In support of his contention, he has relief upon the Division Bench judgment of this Court reported in 32 GLR 7413. Almost identical question was involved in that matter. The learned Judges had taken pains to obtain additional evidence in the form of botanical evidence which was not produced before the trial Court. After this effort the learned Judges with the assistance of the scientific expert had gone into the details of the chemistry of the prohibited article under the NDPS Act, particularly, with reference to opium poppy and have come to a definite conclusion that unless the substance is shown to be falling within the definition of opium poppy under section 2(xvii) from which the definition of poppy straw section 2(xviii) is derived, the offence under NDPS Act particularly under section 15 cannot be said to be made out. We find the same situation prevailing in the instant case. We therefore accept the argument of the learned advocate Mr Anandjiwala and allow the appeal and set aside the conviction. The accused-appellants are ordered to be set at liberty forthwith if not required in any other offence. Fine if paid is ordered to be refunded.

\*\*\*

(mohd)